

**BEFORE THE THREE MEMBER DUE PROCESS HEARING PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961, RSMo.**

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)
Petitioners)
vs.)
)
St. James R-I School District)
Respondent)

COVER SHEET

PETITIONER

Student's Name:

DOB:

Grade Level:

Parent's Name:

Address:

Representative: None

Address: Same

RESPONDENT

Local Education Agency: St. James R-I School District (LEA)

Address: 101 East Scioto Street
St. James, Missouri 65559

Representative: Ms. Teri Goldman
Address: Goldman Law Firm
36 Four Seasons Center #337
St. Louis, Missouri 63017

Hearing Date: March 9, 2004

Date for Mailing of Decision: April 20, 2004

Date of Decision: March 9, 2004

Date Decision Mailed: March 10, 2004

Panel Members: Dr. Karla Duff-Mallams
Ms. Jeffi Jessee
Ms. Margaret M. Mooney, Chairperson

ISSUES AND PURPOSE OF HEARING

In this Hearing, the Petitioners' issues were the Respondent's:

1. Violation of F.A.P.E during IEP placement and meetings
2. Violation of No Child Left Behind Law during IEP placement and meetings
3. Violation of IDEA by manipulation of IEP by administration for own prejudices and purposes of retaliation and conspiracy
4. Violation of First Amendment and Constitutional Rights during/per IEP placement and meetings
5. Violation of Right to be in a controlled and disciplined classroom free from harassment during/per IEP placement and meetings
6. Bullying and intimidation when Due Process sought over IEP placement during IEP meetings and the continuance thereof

TIME LINE INFORMATION

Petitioner's request for due process was sent to the Department of Elementary and Secondary Education on December 18, 2003, a Decision was initially due by February 2, 2004.

On January 4, 2004, the Hearing Chair issued an Order setting this matter for Hearing on January 26, 2004. On or about January 6, 2004, Counsel for School District requested a continuance of the Hearing until April 2, 2004. Parent initially opposed the length of the extension but subsequently agreed to a continuance which could also allow her time to obtain counsel. The Chair notified the parties on January 20, 2004 that the matter was reset for Hearing on March 9-10, 2004 with the Decision to be rendered by April 20, 2004. Parent was directed to clarify the issues for hearing by March 1, 2004. A Pre-hearing telephone conference was scheduled for March 3, 2004. On February 27, 2004 Parent provided a clarification of issues, identifying the above six issues for hearing. At the Pre-hearing telephone conference Ms. Goldman orally moved to dismiss issues 2, 4, 5, and 6 as not cognizable under the IDEA. The Hearing Chair heard oral argument from Parent and decided that Petitioners' issues 2, 4, 5, and 6 were not

issues that were cognizable under the IDEA. Ms. Goldman further requested a clarification of Petitioners' issues 1 and 3. Parent provided further clarification of issues 1 and 3 the same day.

On March 5, 2004 School District filed its Motion to Dismiss, which Parent received on March 8, 2004. It was decided by the Chair that the Motion to Dismiss would be heard on the first day set for Hearing, March 9, 2004.

The Hearing was convened in the St. James School District Central Office at 9:30 a.m. on March 9, 2004. At the Hearing (a) Parent was not accompanied by counsel; (b) Parent elected to open the Hearing to the public; and (c) Student was not present.

Prior to hearing any Testimony the Hearing Panel marked and received into evidence Hearing Panel Exhibits 1-19. Parent stated that she wanted an audiotape of the proceedings in addition to the verbatim written transcript to be provided by the certified court reporter, who was present. This request was denied by the Hearing Panel.

Parent presented her written response to Motion to Dismiss, which was marked as Hearing Panel Exhibit 20. The parties presented their arguments to the full Hearing Panel on the School District's Motion to Dismiss. The Hearing Panel decided that the Petitioners did not raise any issues under IDEA that the Hearing Panel could consider. The Hearing Panel decided that the Petitioners' Request for Due Process should be dismissed.

The Decision was mailed to both parties by certified mail on March 10, 2004

BEFORE THE THREE MEMBER HEARING PANEL
CONVENED PURSUANT TO RSMO §162.961

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Petitioners.)
)
v.)
)
ST. JAMES R-I SCHOOL DISTRICT,)
)
Respondent.)

DECISION AND ORDER

The Hearing Panel Convened pursuant to the Order of the Hearing Chair in the meeting room of the St. James School District. Present at the hearing were Panel Members Margaret M. Mooney, Karla Duff-Mallams and Jeffi Jessee, Parent on behalf of Petitioner and Ms. Myra Soete, District representative and Ms. Teri Goldman, counsel for the District.

On March 8, 2004 the Hearing Chair issued a Decision and Order regarding the issues for Hearing confirming the ruling made during a telephone conference with the parties on March 3, 2004 dismissing certain issues raised by Petitioners. The issues dismissed were:

2. Violation of No Child Left Behind Law during IEP placement and meetings
4. Violation of First Amendment and Constitutional Rights during/per IEP placement and meetings
5. Violation of Right to be in a controlled and disciplined classroom free from harassment during/per IEP placement and meetings
6. Bullying and intimidation when Due Process sought over IEP placement during IEP meetings and the continuance there of

These four issues were determined to not be issues that may be heard by a Due Process Hearing Panel appointed pursuant to R.S. Mo. § 162.961 under the IDEA 20 U.S.C. §§1412 et

seq. and pursuant to 20 U.S.C. §1415(b) (6) the subjects to be addressed by this panel are those “relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate education to such child.

Petitioners filed a clarification of issues 1 and 3 on March 3, 2004. On March 5, 2004, School District filed its Motion to Dismiss contending that none of Petitioners’ claims are justiciable under the IDEA. The Chair of the Hearing Panel notified the parties that when the Due Process was convened at 9:30 am on March 9, 2004 Petitioners and School District would be permitted to present their arguments on the Motion to Dismiss and then to go forward with the Hearing, if necessary.

When the Hearing opened, the Chair identified for the record and provided all present with copies of Hearing Panel Exhibits 1 through 19. Petitioner Parent stated on the record that the Hearing would be “open.” Petitioner Parent raised the question of whether she could have an audiotape of the Hearing to show the tone of voice used. The Hearing Panel considered this request off the record and determined that pursuant to 34CFR §300.509 (4) and (5) there was no right to an audiotape of the Hearing in addition to the verbatim written transcript of the Certified Court Reporter.

Petitioner Parent provided all present with a copy of her Response to the Motion to Dismiss. This was marked as Hearing Panel Exhibit 20. Petitioner read a portion of her Response to all present at the Hearing and made arguments on the record. Petitioner also orally presented her argument on the issues for this Hearing. Ms. Goldman responded for the District. The Hearing Panel recessed to consult DESE on the issue of audiotaping and to consider the Petitioners’ issues and the Motion to Dismiss.

The Hearing Panel also fully considered the issues for this Hearing. In its consideration the Hearing Panel looked at the 10/24/03 IEP Notice, the 10/24/03 IEP and the student's attendance record that were included in Respondent's exhibits. These three items were marked as Hearing Panel Exhibits 21, 22 and 23.

The Hearing Panel considered Petitioners' issue that Student was denied FAPE, as a result of a) the discipline by Mr. Bailey; b) suggestion by Mr. Bailey of an alternative school for Student; and c) the suggestion that Student lose his credits. It was the Hearing Panel's determination that the evidence and argument showed that due to the intervention of the IEP team and Ms. Myra Soete the suspension was withdrawn and there was no placement in an alternative school. In addition due to action by the Board of Education there was no loss of credits. Reference to the IEP Notice and IEP (HP Exs. 21 and 22) revealed that parent received notice of the 10/24/03 IEP meeting and the Parent and Student both participated in development of the IEP. There was no suggestion that Student did not receive the services identified in his IEP.

The Hearing Panel considered Petitioners' issue that there should have been notice given regarding change of placement. The Hearing Panel reviewed Hearing Panel Exhibits 21, 22, and 23 and the affidavit of Ms. Soete appended to the District Motion to Dismiss. The evidence showed that Student was suspended for 6 days.

Mother did not testify under oath, but she offered substantial information to the Hearing Panel about the events that occurred in October and November 2003. Parent again raised the issue of harassment as denial of FAPE. The Hearing Panel determined that this was not an issue

that it could hear, as decided by the Hearing Panel Chair on March 3, 2004 and provided in writing to the Petitioner on March 8, 2004

CONCLUSIONS OF LAW

1. This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.; the IDEA's implementing regulations, 34 C.F.R. Part 300; Missouri's special education statutes, §§162.670-162.999, RSMo.; and the Missouri state regulation implementing its special education statutes, 5 C.S.R. §70_742.140 ("Individuals With Disabilities Education Act, Part B This rule incorporates by reference changes to the annual program plan required by new federal statutes for the provision of the services to eligible children."). The Missouri regulation is referred to as the State Plan. The IDEA, its regulations and the State Plan for Part B of the Individuals With Disabilities Education Act (2002), ("State Plan") set forth the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies, such as the District in providing special education and related services to students with disabilities.

2. The Student is a "child with a disability," as that term is defined in the IDEA, its regulations, 34 C.F.R. §300.7 and a handicapped child for purposes of Missouri Law. From an educational perspective Student is diagnosed as autistic.

3. The District is a Missouri School District organized pursuant to Missouri Statutes. Parents and Student are now and have been residents of the District during all times relevant to this due process proceeding, as defined by §162.890 RSMo. and the State Plan. Pursuant to Missouri law, the St. James School District is responsible for providing special education and related services to students with disabilities, as defined by the Missouri State Plan

for Implementing Part B of the Individuals with Disabilities Education Act, who reside in the school district including Student.

4. The State Plan was in effect at all material times during this proceeding. The State Plan constitutes regulations of the State of Missouri, which further define the rights of students with disabilities and their parents and regulate the responsibilities of educational agencies.

5. The purpose of the IDEA and its regulations is: (1) “to ensure that all children with disabilities have available to them a free appropriate public education that includes special education and related services to meet their unique needs”; (2) “to ensure that the rights of children with disabilities and their parents are protected”; and, (3) “to assess and ensure the effectiveness of efforts to educate those children.” 34 C.F.R. § 300.1.

6. The IDEA requires that a disabled child be provided with access to a “free appropriate public education.” (“FAPE”) Board of Education of the Hendrick Hudson Central School District, Board Of Education, Westchester County v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982). The term “free appropriate public education” is found in the IDEA 20 U.S.C. § 1401(8) and is defined by 34 C.F.R. § 300.8 as follows:

“...the term ‘free appropriate public education’ means special education and related services that--(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the SEA, including the requirements of this part; (c) Include preschool, elementary school, or secondary school education in the State involved; and, (d) Are provided in conformity with an IEP that meets the requirements of §300.340--300.350.” A principal component of the definition of FAPE is that the special education and related services provided to the student with a disability, “meet the standards of the SEA” (State Board of Education), and “the requirements of this part”. 34 C.F.R. Part 300.

7. The IDEA requirement to provide a FAPE “is satisfied when the state provides personalized instruction with sufficient support to benefit educationally from that instruction; the requirement of a FAPE does not require the state to maximize each child’s potential commensurate with the opportunity provided to non-disabled children.” Breen v. St. Charles R. [VI] School District, 2 F.Supp.2d. 1214, 1221 (E.D.Mo.1997), aff’d 141 F.3d 1167, 1998 WL 172602 (8th Cir.1998)(unpublished decision); see also, Rowley, 458 U.S. at 200, 102 S. Ct. 3034; Reese v. Board of Education of Bismarck R-V School District, 225 F.Supp.2d 1149, 1155 (8th Cir. 2002).

8. If parents believe that the educational program provided for their child fails to meet this standard, they may obtain a state administrative due process hearing. 34 C.F.R. § 300.506; Thompson v. Board of the Special School District No. 1, 144 F.3d 574, 578 (8th Cir. 1998); Fort Zumwalt School District v. Clynes, 119 F.3d 607, 610 (8th Cir. 1997), cert. denied 523 U.S. 1137, 118 S.Ct. 1840. 140 L.Ed2d 1090 (1998).

9. The IDEA is designed to enable children with disabilities to have access to a free appropriate public education which is designed to meet their particular needs. O’Toole by O’Toole v. Olathe District Schools Unified School District No. 233, 144 F.3d 692, 698 (10th Cir. 1998).

DECISION AND ORDER

It is the Decision and Order of the Hearing Panel that:

1. there is no justiciable issue of denial of FAPE to Student that this Panel can hear;
2. there is no justiciable issue of violation of the parent’s right to written notice of discussion of change of placement that occurred at the 10/24/03 IEP meeting.

3. Petitioners' Request for Due Process is dismissed and an Order is entered consistent with the foregoing.

APPEAL PROCEDURE

PLEASE TAKE NOTICE that these foregoing constitute the final decision of the Department of Elementary and Secondary Education in this matter and you have a right to request review of this decision pursuant to the Missouri Administrative Procedures Act, §536.010 et seq. RSMo. Specifically, §536.110 RSMo. provides in pertinent part as follows:

1. Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within forty five days after the mailing or delivery of the notice of the agency's final decision....
3. The venue of such cases shall, at the option of the plaintiff, be in the circuit court of Cole County or in the county of the plaintiff or of one of the plaintiff's residence...

PLEASE TAKE NOTICE that you also have a right to file a civil action in Federal or State Court pursuant to the IDEA. See 34 C.F.R. §300.512.

Dated: March ___, 2004

Margaret M. Mooney, Hearing Chair

Karla, Duff-Mallams, Panel Member

Jeffi Jessee, Panel Member

Copies of this Decision will be mailed to the Parent and Counsel for the St. James School District on this date by certified mail return receipt requested and sent by facsimile to same.